FEB 1 4 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,
Petitioner,

v.

E. L. MAXWELL, Warden,
Respondent.

BRIEF AMICUS CURIAE ON THE MERITS ON BEHALF OF THE STATE OF OHIO.

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To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

The Prosecuting Attorney of Cuyahoga County, Ohio, as the authorized law officer thereof, is herewith filing a brief amicus curiae on the merits in the above entitled case, for consideration by this Court in the disposition of this case.

STATEMENT OF FACTS.

The omission in the agreed statement of facts filed in the District Court (in which proceeding we took no part) of all of the pertinent evidence presented by the State in the trial of this case, necessitates our directing the attention of this Court to an objective statement of the evidence as set forth in the opinion of the Court of Appeals of Cuyahoga County (R. 64a-80a).

The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom sometime between 3 and 4 a.m. on the morning of July 4th, 1954; that at the time she was murdered the only person in that home, except a six year old son, was her husband, the petitioner. It was conclusive from the evidence that there was a simulated burglary and that nobody but the petitioner had the time and exclusive opportunity to fake such a burglary to divert suspicion from himself. The evidence was so overwhelming that the burglary set-up was a fake that even counsel for the defense was obliged to say to the jury:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (Tr. 62, Supp.)

The jury was fully justified in concluding that the only one who was in a position to and had the time, and who actually did set up this fake burglary was the petitioner.

That the story told by the petitioner about the bushy-haired "form" in the house, and on another occasion "forms" (he wasn't sure whether there was one or two "forms") was concocted, is shown by the evidence.

The evidence established that Dr. Lester Hoversten visited the petitioner at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (Tr. 3803).

Dr. Hoversten testified relative to that incident as follows:

> "Q. Did Steve leave at any time after he came in?

A. Yes. After speaking sharply to me, he turned on his heel and walked quickly out of the room, and then he came back in just a few minutes.

Q. And when he came back in, did he say anything?

A. Yes. I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the bed, and he advised Dr. Sam to go over in his mind several times a day—

As I recall, Dr. Steve addressed Dr. Sam, and said in words to this effect, 'You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned,' and then he gave as an example, 'You were upstairs, you went downstairs, and from here to there,' and so forth." (Tr. 3812-13.)

The fantastic stories told by the petitioner were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

The Court of Appeals of Cuyahoga County, after giving in its opinion a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of the declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning, said:

"The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

"The jury, under the instruction of the court, was presented with but one question or issue of fact and that was, had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?

"The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond a reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. Carter vs. State, 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict was required.

"This was a jury question and *we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.*" (Emphasis ours.)

Reference is made in the petition (p. 10) to the injuries allegedly sustained by the petitioner. Petitioner's injuries were the subject of conflicting testimony on the trial. Whatever injuries the petitioner sustained, he claimed they were caused by a blow or blows of the fist of the assailant that he encountered in the bedroom where his wife came to her death as a result of many blows on the head with a blunt instrument. It was on this occasion and only then, that the petitioner claimed that there might have been two assailants, "one working over his wife" and

the other striking the petitioner from the back with his fist. While petitioner was "chasing" the "form" to the beach (instead of summoning help for his wife), there was no suggestion that there was more than one object or form in front of him.

Reference is made in the petitioner's brief to the use of the words "grilling" and "third degree" in a newspaper editorial (considered by this Court in the former petition). Those expressions are frequently applied to a thorough interrogation and do not at all necessarily mean the use of force or violence. No one laid a hand on the petitioner. Further, that editorial appeared months before the trial.

The transcript of the bail hearing which appears in the Appendix to the petition is not complete (s.164). The complete answer of the foreman explaining the "pressure" was as follows:

> "Q. What was the pressure that was placed on you?
>
> A. *Only curious people who wanted to know what we knew on the Grand Jury.*" (Emphasis ours.)

The pressure was for information and not, as suggested, to indict the petitioner.

No evidence was proffered by the State on the trial of this case that the petitioner refused to take a truth serum test. His brother, Dr. Steve Sheppard, a defense witness, testified on cross-examination and re-direct as an expert on the use of the drug sodium pentothal; that its common use is for anesthesia and that its use as a truth serum has been condemned.

SUMMARY OF ARGUMENT.

In reversing this State court conviction, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself (not assigned as error in the State courts), (3) evidence that Sheppard had refused to take a lie detector test (not assigned as error in the State courts) and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families.

On the aspect of publicity, the District Judge relied mainly upon this Court's holdings in *Irvin v. Dowd*, 366 U. S. 717 (1961) and *Rideau v. Louisiana*, 373 U. S. 723 (1963), decisions which were rendered by this Court some years after the case at bar was finally adjudicated on the merits and certiorari was denied, *State v. Sheppard*, 352 U. S. 910 (1956) and *State v. Sheppard*, 352 U. S. 955 (1956). There is to be found in the decision of the District Judge no independent evaluation of the voir dire testimony, as this Court held should be done, *Irvin v. Dowd*, *supra*. This task was performed by the Court of Appeals. As the majority of the Court of Appeals said, neither *Irvin* nor *Rideau* support a holding that the jurors' testimony had to be rejected by the trial judge and that a fair jury could not possibly have been obtained in this case.

In holding that the trial judge was not a fair and an impartial judge in the trial of this case and should have disqualified himself, the District Judge gave credence to an unsworn statement made by a former Cuyahoga County employee to the effect that in July, 1954, the trial judge allegedly said that he (Sheppard) was guilty, and to an

unsworn statement made by Dorothy Kilgallen (she was not cross-examined) to the effect that the trial judge allegedly said to her that Sheppard was "guilty as hell" and that the case was "open and shut." These statements were made ten years after the trial and at a time when they could not be rebutted because the trial judge was deceased. The statements were therefore incompetent as hearsay.

The District Judge also cited in support of his finding that the trial judge should have disqualified himself, the decisions in *State, ex rel. Pratt v. Weygandt, Chief Justice*, 164 O. S. 463, 132 N. E. (2d) 191 (1956); *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749 (1927); and, *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942 (1955), which are completely inapposite. The trial judge in the case at bar was not the trier of the facts. Nor is there any basis in the record of the trial of this case for any finding that the trial judge lacked integrity and did not discharge his duties conscientiously, carefully, and with dignity and due regard for the constitutional rights of the petitioner to a fair trial. And, most important in the habeas corpus record, is a statement by one of the original defense counsel, relating that Judge Blythin offered to disqualify himself if defense counsel wished, but they were satisfied that he would be fair and impartial and did not file any affidavit of bias and prejudice. (R. 382a.)

Nor were any appellate remedies withheld from this petitioner as was the case in *Fay v. Noia*, 372 U. S. 391, a decision which the District Judge held applicable in connection with his finding on the lie detector testimony, which had not been assigned as error in the State courts. Nor is there any evidentiary showing that the petitioner was denied due process of law on this issue.

There is no evidentiary showing in this case that the jurors' calls to their homes contained any improprieties.

Not mentioned by the District Judge or by the dissenting opinion is the testimony of bailiff Francis taken at the hearing on the motion for new trial, showing that the telephone calls made by the jurors to members of their families were harmless (Tr. 7084-7085).

The laws of the State of Ohio provide for a motion for new trial and upon the hearing of that motion, the affidavits and testimony of the jurors may be received, *Emmert v. State*, 127 O. S. 235; *State v. Joseph*, 90 O. A. 427. Although several jurors were subpoenaed and were interrogated by defense counsel at the hearing on the motion for new trial, not a word of testimony was produced to justify the defense claim that the jurors were influenced by anything other than the evidence produced in open court, in reaching their verdict. The claim that they were influenced by new stories or any other outside influence is not supported by the record.

And the majority opinion of the United States Court of Appeals in the proceeding here involved, states:

> "1) *Publicity.*
>
> "We should at the outset confess a certain temptation to yield to today's accelerating current of excitement and concern about undue press coverage of criminal charges and trials, and to affirm petitioner's release as dramatic vindication of the bar's contention that some of its own members and some of the various media of information have by misuse of their rights prevented our courts from according fair trial to all who are accused of crime. Doubts as to the efficacy and propriety of such action, however, are supplemented by the certain knowledge that it is our duty as federal judges to avoid a state judgment of conviction only where some constitutional infirmity may be found. Careful consideration of this case leads to the conclusion that no such infirmity infects Dr. Sheppard's conviction." (Pet. App. A, s.6-s.7.)

The American Civil Liberties Union and its Ohio affiliate, hereinafter referred to in this brief as the ACLU, in their Amici brief ask this Court to restrict the exercise of the First Amendment Freedoms by certain of the citizenry and to require the State trial courts to do likewise when a crime has been committed.

The discrimination which the ACLU seeks to have this Court apply against certain of the citizenry such as law enforcement officers and the news media is not only prohibited by the First Amendment and the Fourteenth Amendment, but by Article I, Section 11 of the Ohio Constitution, which provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

As this Court said, in *New York Times v. Sullivan*, 11 L. Ed. 2d 1109 (1965), by Mr. Justice Goldberg in a concurring opinion:

> "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false or malicious * * *."
>
> "Such criticism cannot in my opinion be muzzled or deterred by the courts * * *."

The Fourteenth Amendment protects the First Amendment freedoms against abridgement by state action, so that a State court has no constitutional authority to interfere with the exercise of the First Amendment free-

doms, and the trial court in the case at bar recognized this limitation of its authority. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. *Smith v. California,* 361 U. S. 147 (1959); *Talley v. California,* 362 U. S. 60 (1960); *NAACP v. Flowers,* 377 U. S. 288 (1964); *NAACP v. Button,* 371 U. S. 415 (1963).

This is not a case where law enforcement agencies were making any public statements concerning progress of investigation of a crime or proof already obtained as to the complicity of any person. The publicity that occurred during the investigation of this crime shows just the opposite. The news media were criticizing the law enforcement agencies because of a lack of progress in the solution of the crime. Nor were there any public statements by law enforcement officers during the investigation that any proof or any confession had been obtained as to the complicity of the petitioner in the murder.

The publicity that occurred in this case was engendered by the petitioner's own acts and was not a one-way thoroughfare. The petitioner, members of his family and his counsel were fairly prolific in the exercise of the First Amendment freedoms in their statements to the newspapers for publication and public consumption before and during the trial, as will hereinafter be noted in this brief.

There was no conflict between the exercise of the First Amendment freedoms and a fair trial in this case. If the evidence offered on the trial itself was not sufficient to convict, or any other constitutional guaranty to a fair trial was violated on the trial itself, remedy was provided by due process of law in the courts, regardless of what anybody had to say about the case in the news media or elsewhere before or during the trial.

ARGUMENT.

INTRODUCTORY STATEMENT.

The newspaper articles, headlines and other newspaper material contained in the District Court's decision, in the dissenting opinion in the Court of Appeals, in the petitioner's brief and in the ACLU Amici brief were not offered in evidence by the prosecution on the trial, nor were they received in evidence for the consideration of the jury in the trial of this case, and the claim that the trial jury was influenced in reaching its verdict by this newspaper material, rather than by the evidence produced in open court, is merely the assertion of the District Judge, the dissenting judge, petitioner's present counsel and counsel for the ACLU Amici.

It is therefore not within our province to explain or defend anything that appeared in a newspaper, favorable or unfavorable, since these newspaper articles and headlines were not offered in evidence by the prosecution, or received in evidence by the trial court and any opinions or interpretations as to their meaning, such as rendered by the District Judge, the dissenting opinion, and as argued by present counsel for the petitioner and counsel for the ACLU in their briefs, are, under the circumstances, pointless. The argument then of both petitioner's counsel and counsel for the ACLU that much that was never offered and would have been inadmissible if offered at the trial, appeared in the newspapers, is also pointless, since the prosecution did not offer newspaper articles into the evidence for the consideration of the jury, and there is no proof that the jury were reading the papers or were influenced in reaching their verdict by anything other than the evidence produced in open court.

No factual proof has ever been offered in this case, either on the hearing on the motion for new trial when an

opportunity was afforded to interrogate the jurors, or on the direct appeal on the merits to this Court, or in the present habeas corpus proceeding, that the trial jury that was carefully selected, interrogated as to possible contacts with pre-trial publicity, and accepted by both sides in this case, were inherently suspect, lacked integrity and were untrue to their oaths to decide this case on the evidence produced in open court and on nothing else, as instructed by the trial court.

The claim that the Cleveland Press campaigned to have the petitioner arrested, indicted and convicted and that without the deliberate pressure of the Cleveland Press, there would have been no inquest, no arrest and no trial is a persecution complex adopted by the defense on the trial, in the hope of inoculating the trial jury and the courts with that persecution complex. This matter was under investigation by the authorities after the murder was committed. It was under investigation by the Prosecutor's office from July 7th, 1954 on and when we thought we had sufficient evidence to present to the Grand Jury, the case was presented to the Grand Jury. There was nothing forced here at all by the newspapers. We had the necessary evidence.

We had no help from the Cleveland Press or any other news media in painstakingly gathering together the scientific and other evidence that was offered by the prosecution to the Grand Jury and on the trial of this case, which the trial record shows established the guilt of this petitioner of the murder of his pregnant wife beyond a reasonable doubt, and present counsel for the petitioner does not point to any insufficiency in the evidence offered on the trial. Further, although this murder was committed, by his own admission, in the presence of the petitioner in his home, we received no help from the petitioner in the solution

of this crime. No husband ever displayed a more lackadaisical interest in helping to solve the murder of his wife than did this petitioner. His demeanor throughout the investigation was evasive and uncooperative. It was, then, the petitioner himself, by his actions after the murder of his wife was committed, and his public disclaimer of any knowledge as to who killed his wife, though he was present when she was killed, who brought about the barrage of publicity that occurred in this case.

It is ludicrous then, as the District Judge did, to hold the trial judge, the trial jury and the prosecution responsible for the petitioner's acts that resulted in the type of publicity that occurred in this case, criticizing the petitioner and criticizing the public officials.

If anyone had a "trial by newspaper" in this case, the trial judge, the trial jury and the prosecution did in this habeas corpus proceeding, for the decision of the District Judge shows that his findings against the trial judge, the trial jury and the prosecution are based substantially upon what he read in the newspapers, and not upon what the trial record shows. And these findings were made without giving the prosecution an opportunity to defend and be heard (Pre-trial Order No. 1). The proceeding was not open to the public, a practice condemned by this Court in *In Re Oliver*, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499.

The decision of the District Judge shows further, that he made no independent evaluation of the voir dire testimony in reaching his conclusion that the trial jury lacked integrity.

Who should be in a position to know whether the trial jury, selected by both sides, was a fair and an impartial jury? The District Judge, who was not present, did not examine the voir dire and had no connection with the trial proceedings? Petitioner's present counsel and counsel for

the ACLU, who had no connection with the case and did not represent the petitioner on the trial? Or, defense counsel who represented the petitioner on the trial and took part in the selection of the jury? And, defense counsel who represented the petitioner on the trial and who were in a position to know and observe this jury throughout the trial, were satisfied that they had a fair and an impartial jury for they stated to the jury in argument:

> "May I take this opportunity—as I started to say, may I take this opportunity to congratulate you on the splendid attention, the tireless effort you have displayed during these nine weeks. You have been deprived, probably, of many comforts that you ordinarily enjoyed in and around your home with your family because of the *admonitions* that you have received throughout the trial by his Honor, Judge Blythin.
>
> "The purpose, ladies and gentlemen, of those admonitions was that we could come to this point in the lawsuit where your minds would be free, your minds would be open, and that you could take into consideration all the facts and all the testimony that has been submitted to you *without any outside influence*, and I am sure, and I say this to you sincerely, *because I have had the opportunity of observation during this entire period, that you have done just that.*" (Tr. 5371-5372.) (Emphasis ours.)

As a further demonstration of the confidence defense counsel who represented the petitioner at the trial had in this trial jury, an opportunity was accorded counsel on the hearing on the motion for new trial to interrogate the jurors, but they did not see fit to inquire into possible contacts with trial publicity.

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

The trial of this case started on October 18, 1954, some three and a half months after the crime was committed. When a motion for a change of venue and/or a continuance was made at the outset of the trial, because of the publicity that had occurred, the trial court said:

> "This court is not now in a position to know at all whether we can have a fair and impartial jury in this case. His belief, based on experience, is that we certainly can, but he certainly will not proceed with this case in this county at all if it appears by any reasonable picture that a fair and an impartial jury cannot be had." (Tr. 16.)

The trial court said further:

> "The motion for change of venue will be held in abeyance, and we will proceed at 1:15 this afternoon in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this court's mind at all but what this case ought to go out of Cuyahoga County, whatever may be the effect of that." (Tr. 18.)

The right to a change of venue is a statutory right in Ohio, subject to the sound discretion of the trial court to determine whether a fair and an impartial jury can be impanelled in the county wherein the crime was committed, *Richards v. State*, 43 O. App. 212, 183 N. E. 36. The only way in which that can be determined is to proceed to impanel a jury, which is what the trial court did in this case.

Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity. The Constitution provides that the defendant in a criminal case is entitled to a speedy and

public trial. As it was, the petitioner was not brought to trial until three and a half months after the crime was committed, and the trial court was not required to delay the trial indefinitely, otherwise the petitioner could be heard to complain that his constitutional right to a speedy and public trial was violated. Counsel for the petitioner had applied for a continuance of the trial "to permit the extraordinary publicity to quiet down." It was not claimed that they were not prepared for trial, and, as the trial court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when, nor how."

A. As to Publicity Before the Trial.

The jurors who sat in the trial of this case were fully examined so far as defense counsel who represented the petitioner on the trial desired as to any knowledge or information they might have of the case. At no stage of the proceedings in the trial court, on the hearing on the motion for new trial, or on the appeals did the petitioner offer any evidence to prove that any juror was in fact hostile, unqualified or prejudiced by the publicity, or was untrue to his oath to decide the case on the evidence produced in open court and on nothing else.

Juror Barrish is mentioned in the petitioner's brief (p. 32), together with the reason he gave for having read about the case. The further extended examination of Juror Barrish by both parties is omitted from the petitioner's brief and the defense omit to state that Juror Barrish was accepted by passing him for cause (R. 115) and that the defense had peremptory challenges which they chose not to exercise with reference to Juror Barrish.

Juror Borke is also mentioned in the petitioner's brief (p. 32). Here again, the extended examination of Juror Borke by both parties is omitted from the petitioner's brief,

showing that the defense were satisfied that Juror Borke would be an impartial juror, and they chose not to exercise a peremptory challenge with reference to this juror.

The Court of Appeals independently evaluated the voir dire testimony and said:

> "In determining whether Dr. Sheppard has carried the burden of demonstrating the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination of the prospective jurors in the state court. *Irvin v. Dowd*, 366 U. S. 717, 723 (1961); *United States ex rel. Bloeth v. Denno*, 313 F. (2) 364, 372 (CA 2, 1963), *cert. denied*, 372 U. S. 978 (1963); *United States ex rel. Brown v. Smith*, 306 F. (2) 596, 602 (CA 2, 1962), *cert. denied*, 372 U. S. 959 (1963); *Geagan v. Gavin, supra*, 292 F. (2) 246-47. The voir dire examination fills nearly 1600 pages in the record of the present case. Each prospective juror was questioned about his acquaintance with the pre-trial publicity, and each of those who ultimately returned the guilty verdict swore that such publicity had created in his mind no opinion as to the guilt or innocence of the defendant and would not affect his deliberations. A reading of the voir dire discloses its thoroughness and careful inquiry as to any effect that publicity might have had on the veniremen. We find it without substantial fault and neither has counsel pointed to any insufficiency or impropriety in it. * * *" (Pet. App. A, pp. s.11-s.12.)

The Court of Appeals also evaluated the pre-trial publicity, and stated:

> "It should be emphasized that nowhere in the news items is there any hint or suggestion that Dr. Sheppard confessed or admitted his guilt, or any claim that he had a criminal record or had been other than an exemplary citizen, or any clear assertion that the press

or the police had any direct evidence of his guilt. Comments to the press by police officials, and even prosecutors, occasionally exceeded the bounds of propriety, but they too revealed no more than that some thought that Dr. Sheppard was guilty. In addition to the pretrial publicity set forth in the District Court opinion, the Cleveland papers also published items emphasizing Dr. Sheppard's protestations of innocence." (Pet. App. A, p. s.15.)

As justification for failing to examine the trial record on the voir dire, the District Court pointed out that in *Rideau v. Louisiana*, 373 U. S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 (1963) the Supreme Court did not examine the transcript of the voir dire in reaching its determination as to prejudice and held in that case that the assurances of jurors on voir dire may be disregarded. But in the *Rideau* case, this Court was there considering conceded circumstances that on the voir dire, counsel for Rideau had requested that certain jurors who later decided the case, be excused for cause, and these challenges for cause had been denied by the trial judge.

Mr. Justice Stewart stated in the majority opinion, in *Rideau*, 373 U. S. at page 725:

"Three members of the jury which convicted him had stated on voir dire that they had seen and heard Rideau's televised 'interview' with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge."

The District Court also cited *Irvin v. Dowd*, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639. But again, in the *Irvin* case, the Supreme Court based its findings upon an examination of the trial record and held at page 756, 6 L.

Ed. 2d, that it is the duty of the federal court on habeas corpus to independently evaluate the voir dire testimony of the impaneled jurors.

There was no proof presented to the District Court by the petitioner, and the burden of proof was upon the petitioner, that the jury that was finally impaneled by both sides was not a fair and impartial jury as a result of publicity before the trial. Nor do the decisions cited by the District Court support the proposition that a court may, on habeas corpus, as the District Court has done, determine whether a defendant had a fair and impartial jury impaneled, by reading the newspapers, without regard to what the trial record shows. The court has indulged in speculation and conjecture about the adverse effect certain newspaper articles and headlines, occurring before the trial, may have had upon the jury that was selected in this case, and concludes on that basis alone, without any proof, that the petitioner did not have a fair and impartial jury.

It must be remembered that the Mayor of Bay Village was a close personal friend of the petitioner, as were the police officers in Bay Village for whom he was the police surgeon; that he was whisked off to Bay View Hospital by his brothers without permission before the Coroner or any of the Cleveland police officers arrived; that a protective shield was thrown around him and that the petitioner and his counsel would permit no interrogation except under their own terms and by designated friendly officers; and that the petitioner and his counsel were obstructing the public authorities in what should be the normal investigation of a murder.

It seemed, at least to the newspaper editors, that certain public officials were "sitting on their hands" and were fearful, for one reason or another, of proceeding vigorously in the investigation as they would in any other

case. Certainly, these newspapers had a right to criticize what they deemed to be a deliberate attempt to shield the petitioner from interrogation, and a lack of progress on the part of the public authorities in the investigation and solution of this crime. It was inevitable that there would be publicity concerning the petitioner's unwillingness to be interrogated save on his own terms and conditions and that the public officials would be criticized.

Whether we or the Courts agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point. It is pertinent to ask: What caused the publicity before the trial, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforcement officers to thoroughly investigate and to bring to justice the person who murdered her. Much of the publicity injected into the District Court's decision occurred months before the trial took place. The murder occurred on July 4th and the petitioner was not brought to trial until October 18th. A great deal of the newspaper publicity occurring before the trial was inspired by the lack of cooperation of the petitioner with the authorities beginning immediately after the murder of his wife was committed, by the protective shield thrown around him, and by the strategy of his counsel who was hired within hours after the murder. None of the publicity was deliberately promoted by the prosecution.

Any sensational murder such as this brings forth publicity, some more, some less, but in the circumstances of each case, the issue before the trial court is whether a fair and impartial jury can be obtained. The jurors who sat in the trial of this case were all thoroughly examined and definitely stated that they would give to the petitioner the benefit of the presumption of innocence. They were

fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. At no stage of the proceedings in the trial court or on the appeals did the petitioner offer any evidence to prove that any juror was in fact hostile, unqualified or prejudiced by the publicity, and, moreover, a period of two months and a half intervened between the day of the petitioner's arrest and the beginning of the trial.

The presumption is that the jurors followed the instructions of the court. A distrust of the jury without any affirmative showing that they were not to be trusted in following out the court's instructions is what the District Judge and dissenting judge urge.

Mr. Justice Holmes said in *Holt v. United States,* 218 U. S. 245, at 251 (1910), 31 S. Ct. 2, 6, 54 L. Ed. 1021:

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day * * *"

In *United States v. Sorcey,* 7 Cir., 151 F. 2d 899, 903 (1945), certiorari denied, 327 U. S. 794, 66 S. Ct. 821, 90 L. Ed. 1021, the court stated:

> "* * * we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court, * * *"

In *Opper v. United States,* 348 U. S. 84, at 95 (1954), 75 S. Ct. 158, 165, 99 L. Ed. 101, the court said:

> "* * * Our theory of trial relies upon the ability of a jury to follow instructions. * * *"

In *Delli Paoli v. United States,* 352 U. S. 232, 242 (1957), 77 S. Ct. 294, 300, 1 L. Ed. 2d 278, the court said:

"* * * Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

In the instant case, the prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. The fact that prospective jurors had read something about the case before they were sworn as jurors did not necessarily disqualify them. We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

It was held in *Irvin v. Dowd, supra,* 6 L. Ed. 2d, at p. 756:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the

presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138."

The process of impaneling the jury in the Sheppard case demonstrated that there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals of Cuyahoga County as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and could not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

"The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused. From the foregoing analysis of the venire of 75 electors called in this case, four of those called were not needed in impaneling a jury of 12. Such jury was selected as provided by law and sworn and *accepted* by the defendant to well and truly try and true deliverance make between the State and the defendant.

"The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innocence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313.37 R. C.)

"The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury." (R. pp. 60a-61a.)

No matter when or where tried, the Sheppard case would have attracted widespread publicity. This was inherent in the very nature of the case itself. The right to grant a change of venue lies in the sound discretion of the trial court. The trial court stated on the motion for new trial in ruling on the denial of the motion for change of venue and/or for a continuance:

"(3) *Denial of change of venue requested by defendant.* The request, when made, was based upon the claim that extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention through-

out the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

"Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. *It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved—what actually was involved was a mere mystery—a 'whodunit.'* The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all. (Emphasis ours.)

"(4) *Error in denying application for continuance.* The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was 'to permit the extraordinary publicity to quiet down.' It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to 'quiet down' the publicity, nor when or how." (R. pp. 35a-36a.)

As stated in the opinion of the Supreme Court of Ohio on this case:

"At the conclusion of the impaneling of 12 jurors, the motion for change of venue was renewed (for the third time), at which time, in overruling the motion, the trial court said:

'That the best evidence in the world is the effort to select a jury, and what we get here is a picture that has taken almost two weeks of time. The court is thoroughly satisfied that we have a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people, as a whole, to try a case of this kind, and the court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the court, and I hope he will be able to give them that in the manner that it ought to be given.'

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings. In Townsend v. State, 17 C. C. (N. S.), 380, 25 C. D. 408, affirmed without written opinion in 88 Ohio St. 584, 106 N. E. 1083, it is said:

'The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"For example, in Richards v. State, 43 Ohio App. 212, 183 N. E. 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. See also, Dorger v. State, 40 Ohio App. 415, 179 N. E. 143; State v. Stemen, 90 Ohio App. 309, 106 N. E. (2d) 662; State v. Deem, 154 Ohio St. 576, 97 N. E. (2d) 13.

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of

a change of venue by the trial judge constituted an abuse of discretion." (R. pp. 110a-111a.)

There were no unusual compelling circumstances in the Sheppard case requiring a disregard of the assurances of the jurors on the voir dire. The petitioner did not confess to the crime as was done by the defendant in the *Rideau* case, nor is there any showing in the instant case that any juror sat on the trial who was unqualified or unaccepted by the defense, as was the situation in *Rideau*.

It is argued in the petitioner's brief that the decisions rendered by this Court in *Rideau v. Louisiana, supra*, and *Irvin v. Dowd, supra*, are applicable to the case at bar, because "a confession claimed publicly to be hidden can be every bit as damaging to an accused facing trial as a confession claimed to have been articulated." (Pet. Br. p. 28.) We don't follow that argument. How can a public hidden confession be made? Here again, counsel for the petitioner attempts to give an opinion and an interpretation as to the meaning of newspaper articles which were not received in evidence on the trial of this case. And there was no confession in this case, either public or hidden.

Further, the instant case is not comparable with *Irvin v. Dowd, supra*, upon which the District Court relied. In the *Irvin* case, the prosecutor and police officials issued press releases stating that the defendant had confessed to six murders. At the trial, the jury panel consisted of 430 persons; 268 of these were excused for cause as having fixed opinions as to the guilt of the petitioner; and 8 of the 12 jurors who finally served on the jury admitted on voir dire that they thought petitioner was guilty.

And there is no comparison of the facts in *Irvin, supra*, to the facts surrounding the selection of the jury in the Sheppard case. None of the pre-trial newspaper articles in the instant case contain any releases from the prose-

cuting authorities that the petitioner confessed. In fact, the petitioner garnered a great deal of publicity before the trial, minimizing any part he may have had in the commission of the murder. Time and again statements were made by the petitioner to the newspapers or on his behalf, declaring him innocent in the clearest and most positive terms.

Omitted from the selection by the District Court of pre-trial newspaper publicity, is the amount of publicity put out by the defense prior to the trial. Innumerable stories appeared emanating from the petitioner, his counsel, his relatives and his friends, minimizing any claim that the petitioner may have committed the murder. Ignored by the District Court in selecting certain newspaper articles upon which to reverse this conviction, were numerous articles that were favorable to the petitioner, published both before and during the trial, such as the following:

The headline on the front page story in the Cleveland News of July 9, 1954, by Severino P. Severino, News Staff Writer, who, as he states, was granted permission to question Dr. Sam in the presence of his father, Dr. Richard A. Sheppard, and his attorneys, William J. Corrigan and Arthur Petersilge. The headline in large type reads:

"EXCLUSIVE! 'I LOVED MY WIFE—SHE LOVED ME,' SHEPPARD TELLS NEWS REPORTER."

Nor did the District Judge list the headline in the Cleveland Press of August 18, 1954, reading: "DR. SAM WRITES HIS OWN STORY." Under the headline appeared the text of a statement by Dr. Samuel H. Sheppard, furnished the Press by a member of his family, and above the headline is an enlarged photograph of the last paragraph of the statement, followed by the signature of the defendant, and reading:

"I AM NOT GUILTY OF THE MURDER OF MY WIFE, MARILYN, HOW COULD I, WHO HAVE BEEN TRAINED TO HELP PEOPLE AND DEVOTED MY LIFE TO SAVING LIFE, COMMIT SUCH A TERRIBLE AND REVOLTING CRIME?"

Nor does the District Judge list the headlines of the statements issued by Attorneys William J. Corrigan and Fred W. Garmone, such as the one appearing in the Cleveland Press of August 27, 1954, reading:

"SHEPPARD LAWYERS HIT STORIES ON MURDER."

followed by the text of the long statement so issued.

The District Judge also might have included other headlines as follows:

July 8, 1954, The Cleveland Press:
"DR. SHEPPARD'S STATEMENT ISSUED TO ANSWER GOSSIP."

July 8, 1954, The Cleveland Plain Dealer:
"BAY DOCTOR TALKS TO REPORTER"

July 8, 1954, The Cleveland Press:
"HUSBAND PUTS $10,000 UP FOR SLAYER"

July 9, 1954, The Cleveland Plain Dealer:
"TEXT OF DOCTOR'S STATEMENT ON HIS OFFER OF REWARD"

July 9, 1954, The Cleveland Plain Dealer:
"DOCTOR WILL HELP IN HUNT FOR DEATH WEAPON TODAY"

July 10, 1954, The Cleveland News:
"HONORED ATHLETE AT HEIGHTS HIGH"

July 12, 1954, The Cleveland Press:
"DR. SHEPPARD RETURNS TO BAY VIEW HOSPITAL TO TREAT HIS PATIENTS"

July 15, 1954, The Cleveland News:
"DRUNK, 'CONFESSES' BUT STORY FIZZLES"

July 17, 1954, The Cleveland Press:
"DR. SHEPPARD TELLS PRESS 'KILLER WILL BE CAUGHT.'"
(Then follows responses to 11 questions.)

July 31, 1954, The Cleveland Press:
"TEXT OF STATEMENT BY CORRIGAN AFTER ARREST OF CLIENT, DR. SAM"

July 31, 1954, The Cleveland News:
"POLICE CORDIAL, POLITE AS THEY TAKE SHEPPARD"

August 13, 1954, The Cleveland Plain Dealer:
"FAMILY POINTS TO BAY MAN AS NEW SUSPECT AS HOVERSTEN TALKS"

August 19, 1954, The Cleveland Press:
"DR. SAM IS ANXIOUS TO TAKE STAND, HIS BROTHER SAYS"

September 14, 1954, The Cleveland News:
"BATTLES PROWLER IN BAY. CORRIGAN LINKS BOY'S STORY WITH SHEPPARD CASE"

September 17, 1954, The Cleveland News:
"DR. STEVE HITS 'RED HERRING' ACCUSATION"

October 19, 1954, The Cleveland Press:
"WRITER FINDS DR. SAM'S LOOKS BIG ASSET FOR ACTOR CORRIGAN"

October 21, 1954, The Cleveland Press:
"DR. SAM JUST LIKE A BROTHER, 2 SISTERS-IN-LAW SAY AT TRIAL"

October 22, 1954, The Cleveland Plain Dealer:
"CORRIGAN RATED SECOND DARROW"

October 25, 1954, The Cleveland Plain Dealer:
"OTHER SIDE OF CORRIGAN LIES IN POETRY"
(With picture of W. J. Corrigan and his writer daughter)

October 26, 1954, The Cleveland Plain Dealer:
"COURT PSYCHOLOGISTS SEE TRIAL CROWD AS NORMALLY CURIOUS"

October 26, 1954, The Cleveland Press:
"SAM, WOMAN JUROR SOB IN COURT"

October 27, 1954, The Cleveland Press:
"CITY CHEMIST AIDS DEFENSE OF DR. SAM"

October 28, 1954, The Cleveland Press:
"JUROR OUT, ADMITS SHE WAS FOR SAM"

November 4, 1954, The Cleveland News:
"LETTERS WRITTEN IN JAIL BARE SHEPPARD FEELINGS"

November 5, 1954, The Cleveland Press:
"DR. SAM SAYS AUTOPSY BUNGLED"

November 9, 1954, The Cleveland Plain Dealer:
"CORRIGAN MUSES ON TRIAL'S DRAMA"

November 10, 1954, The Cleveland Press:
"GARMONE QUIZZING WILTS MAYOR HOUK"

November 11, 1954, The Cleveland News:
"HOUKS HELP DR. SAM AS MUCH AS THEY HURT"

November 11, 1954, The Cleveland News:
"DEATH HOME OPENED TO DR. SAM'S KIN"

November 13, 1954, The Cleveland News:
"CORRIGAN'S STRATEGY SCORES"

November 15, 1954, The Cleveland News:
"CORRIGAN HAMMERS AT DRENKHAN"

November 16, 1954, The Cleveland News:
"CORONER IS VILLAIN OF CORRIGAN PIECE"

November 17, 1954, The Cleveland News:
"DR. STEVE HITS PRINT THEORY; SAYS BLOOD FLOWED INTO FOLD"

November 17, 1954, The Cleveland Press:
"DR. SAM WRITES TO HIS SON"
(Photo of Letter)

November 18, 1954, The Cleveland News:
"DR. SAM DISPLAYS NO-WEAPON THEORY"
(With picture demonstration)

November 19, 1954, The Cleveland Plain Dealer:
"DR. STEVE'S TIP IS EX-PATIENT"

November 19, 1954, The Cleveland News:
"ORDERED HOVERSTEN OUT, DR. STEVE SAYS"

November 19, 1954, The Cleveland Press:
"SEEK STEVE'S 'SUSPECT' IN DETROIT"

November 20, 1954, The Cleveland Press:
"SHOTTKE AIDED SAM: DR. STEVE"

November 22, 1954, The Cleveland Plain Dealer:
"PROBE NEW BAY TIP; DETROIT MAN CLEAR"

November 22, 1954, The Cleveland News:
"SLAYING 'SUSPECT' IS WRITTEN OFF"

December 2, 1954, The Cleveland News:
"EVIDENCE CHANGED: DR. STEVE"

December 4, 1954, The Cleveland News:
"CHIP PAYS CALL ON STORE SANTA"

December 7, 1954, The Cleveland News:
"DR. SAM THANKS REPORTER"

It is not a fact that the petitioner was forced to testify at the inquest (Pet. Br. p. 29). The record shows that the

petitioner testified voluntarily (Tr. 6331). The record also shows the reason for searching the petitioner at the inquest. The police had information that the petitioner was carrying a gun after the funeral of his wife (Tr. 6803).

The petitioner had not been charged with any crime at the time of the inquest, but had been claiming up to that time that he had not done anything to cause the death of the victim. The inquest was therefore held to find out if anyone had any information as to the manner in which and the means by which the victim had been killed, or any information as to the circumstances involving the violent death.

Sec. 313.17 of the Revised Code of Ohio provides that "The coroner may issue subpoenas for such witnesses as are necessary, * * * and proceed to inquire how the deceased came to his death, whether by violence to self or from any other persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto."

Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient.

Untold is the fact that the hearing at the inquest was in perfect order during the testimony of the petitioner, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, counsel for petitioner, who sought to direct the reporter to insert certain matters into the record. Mr. Corrigan was told not to do so and was cautioned that if he

persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refused to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from the hearing room.

This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22d, 23d and 26th and there was at that time no indictment against the petitioner. The disturbance at the inquest which Mr. Corrigan created has no possible bearing on the trial of this case, nor did it prevent the petitioner from having a fair and impartial jury.

On the claim that publication of the names of the veniremen in advance of the trial prejudiced the petitioner, there is no showing that the veniremen were approached by any agents for the state or on its behalf prior to trial, or by anyone else for that matter.

And of a certainty, there is no proof in the record, nor was any affirmative proof presented to the District Court by the petitioner, no "demonstrable reality," that the jury selected in this case was not a fair and impartial jury, or that the publicity before trial influenced the jurors who were finally selected by both sides on the two-week searching voir dire examination. The District Court's finding to the contrary is merely a matter of speculation, with no basis in fact.

B. Publicity During Trial.

The District Judge should have become acquainted with the facts as reflected in the record, showing who was largely responsible for the publicity during trial. Certainly, there is no evidence that either the trial judge or the

prosecution were trying the case in the newspapers. Dr. Steve Sheppard, petitioner's brother and a prospective witness, so persisted in trying to have the petitioner's case tried in the newspapers that the trial court was required to admonish him that if he did not desist, he, being a witness, would be excluded from the courtroom (Tr. 3722). This all took place in the Court's chambers just before the Considine broadcast was brought to the attention of the court, and the Court said:

> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case." (Tr. 3722.)

The petitioner's brother was making uncomplimentary remarks to the news media about the testimony of the State's witnesses (Tr. 3722).

During the trial most of the publicity was given out by the defense. Petitioner had a former newspaperman as one of his counsel, and as a former newspaper man, defense counsel knew very well how to get favorable stories in the public press. He held press conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed any attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the petitioner, his counsel, his relatives and his friends. The bales of newspapers offered by the defense in support of their motions

for a change of venue show these favorable personal stories and the innumerable photographs for which the petitioner and his counsel posed.

That the objection made for the record to the taking of photographs was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testified on the motion for new trial that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (Tr. 7088). His testimony speaks for itself:

"Q. Now, did you take any pictures in this Court room while the court was in session?

A. No, sir, I did not.

Q. Now, while the court was not in session, during recess or after adjournment, did you take pictures in this Court room and around this building?

A. Many times.

Q. Did you take pictures of Mr. Corrigan?

A. Yes, sir.

Q. About how many times?

A. Roughly—it would run considerably over a hundred negatives.

Q. About a hundred negatives. And of Dr. Sam Sheppard?

A. I made many pictures of him.

Q. And Mr. Garmone?

A. He, too, I have made many pictures of.

Q. Now, did Mr. Corrigan ever object to your taking any of these pictures?

A. A few times he has objected.

Q. When was that?

A. About the middle of the trial or towards the end of it, Mr. Corrigan—we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

Q. How many pictures had you taken without his objection before you received those instructions?

A. Oh, many.

Q. More than 50?

A. I'd think so.

Q. And after you received the instructions, did you stop taking pictures?

A. Yes, sir.

Q. And how long did that continue?

A. About a week and a half, two weeks.

Q. Then what occurred?

A. We asked Mr. Corrigan's permission.

Q. And did you get it?

A. Yes, sir.

Q. And then resumed taking pictures?

A. Yes.

Q. How many pictures did you resume taking—did you take after you resumed taking those pictures?

A. I'd say not as many as before because we didn't need as many pictures.

Q. More than 20 or 25?

A. About that.

Q. Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

A. About, yes.

Q. You took about 50 before. Then there was this period when you didn't take any pictures because of the objection, is that correct?

A. That's true, sir.

Q. And then did you later resume?

A. Yes, sir.

Q. With whose permission?

A. Well, when we got Mr. Corrigan's permission, we resumed taking pictures.

Q. And about how many did you take after you got permission?

A. Somewhere around 15, 20, 25.

* * *

Q. Did you ever take a picture of either Dr. Sam Sheppard or any of his counsel over their objection?

A. No, sir.

* * *

The Court: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

The Witness: Yes, sir, I was.

The Court: And at which the Court stated what the rule would be as to taking pictures during the trial?

The Witness: I was.

The Court: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

The Witness: Yes, I do recall.

The Court: All right. State it.

The Witness: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

The Court: That's correct." (Tr. 7087-7091.)

It is obvious from the record that objections by the defense to the newspaper publicity were quite pro forma and mere pretense.

On the voir dire, at the outset, the court instructed the prospective jury that the defendant was presumed to be innocent unless and until he was found by a jury to be guilty of the crime beyond a reasonable doubt and that finding was to come, not from anyone's notions or outside information, but must come on the basis of testimony heard from the witness stand (Tr. 31). The prospective jury were further instructed that they were not to discuss this case or any feature of it with anyone; that they were

not permitted to have anyone speak to them about it; that they were not to remain anywhere where other people were speaking of it among themselves; and that they were not to speak of it among themselves (Tr. 35). The prospective jury were also questioned concerning newspaper articles and radio broadcasts and whether they would be influenced or swayed by anything anybody said outside of the court room (Tr. 167-168, 214).

The prospective jury were also questioned as to whether they would consider the question of the guilt or innocence of the defendant solely on the basis of the evidence that was received in the courtroom from the witness stand (Tr. 236). And they were further questioned as to whether they would follow the instructions of the court not to read anything about the case in any of the newspapers and not to listen to any discussion of the case on the radio or television (Tr. 279).

The court said to the jury at Record 1452:

> "A fair and an impartial juror is a juror who can sit here patiently and who can listen to all of the evidence that is produced in a case and to the instructions of the court as to the law applicable to the particular case, and who can honestly close out the rest of the world for the moment and bring a curtain down on all information he may have about the matter from other sources, and be guided entirely by the evidence and the instructions of the court as to the law applicable to the particular case" (Tr. 1452).

And when the jury was impaneled, the court instructed the jury not to talk about the case to anyone; not to permit anyone to talk to them about it; not to remain anywhere where other people were talking about it themselves, in the jury room or elsewhere; that it was each one's duty as an individual juror and responsible citizen to keep his own counsel, to listen to the evidence that came

from the witness stand and the instructions of the court as to the law, and wait until all those are complete before they formed any opinion or judgment whatever as to the outcome of the case, which opinions and judgments were to be expressed only in the jury room after the case was finally submitted to them for deliberation and decision. The jury were further told by the court that during the pendency of the trial, they were not to listen to comments about it over the radio or otherwise and not to read the newspapers (Tr. 1591). The court said: "You will get here the only facts that you are to consider in the determination of this case" (Tr. 1592).

Each juror had agreed that he or she would disregard everything other than the evidence received in open court and would, in conformity with the instructions of the court, render a fair and impartial verdict. The jurors took the oath required by law and there is not a shred of evidence in the record, nor was there any affirmative proof before the District Court that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record or before the District Court to show that the jury was in any way influenced by reports or stories in the newspapers or over the radio, or anything else, or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

Although several jurors were subpoenaed and were interrogated by defense counsel on the hearing on the motion for new trial, not a word of testimony was produced to justify the claim that the jurors were influenced by anything other than the evidence produced in open court in reaching their verdict. The District Court's finding that publicity during the trial prejudiced the petitioner is based upon mere speculation and suspicion, with no basis

in fact. Certainly, it is not supported by the record. A fair and objective analysis of stories to the public will disclose that they made no effort to slant the stories, certainly not to influence the jury in arriving at their verdict. Nor is there any proof whatsoever offered by the petitioner that the jury was influenced by anything other than the evidence produced in court in reaching its verdict.

The District Court held that the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. This incident was before this Court for consideration in the former petition. Urged for the first time in the Supreme Court of Ohio by the defense, as error, was the refusal of the trial court on motion for continuance in the 5th week of trial to ask the jurors if they heard a broadcast by Bob Considine over Station WHK in which there was something said about the Sheppard case. This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the petitioner, complained that Bob Considine had paralleled a denial of the petitioner as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial. When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't that's all right with me. I make my exception." (Tr. 3725.)

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 *A. L. R.* (2) 1152, wherein it is stated:

> "The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after impanelment, as distinguished from that which occurs on voir dire examination.
>
> "The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

Whatever the news media, whether it be newspapers or radio broadcasts, the same principle should apply. As stated in *Trombley v. Langlois* (R. I.), 163 A. 2d 25 (1960):

> "An impartial trial is one in which jurors reach a verdict upon a consideration of only those matters that were introduced in evidence during the trial and matters not so introduced, should not be brought to their attention through an interrogation of the jury to determine whether they have knowledge of allegedly prejudicial material published in the newspapers."

In *State v. Hilliard*, 89 Arizona 129, 359 P. 2d 66 (1961), it was held that the granting of the defendant's request for interrogation of jurors during trial as to whether they had read newspaper accounts, rested in the

sound discretion of the trial court and refusal to permit poll was not error.

It was held in *Ford v. U. S.*, 233 F. 2d 56 (C. A. 5th Tex.) (1956) that it is within the discretion of the trial court, whether after impanelment during criminal trial, the jurors may be interrogated as to whether they had read newspaper articles. Refusal of trial judge to permit interrogation of jury regarding article was not error, where court instructed jury at beginning of trial not to read "any stories in the newspapers about the case."

The District Court comments that during the trial there was a broadcast by Walter Winchell in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard (R. p. 450a). This incident was referred to in the previous petition. At the request of defense counsel, the court inquired of the jurors whether they had heard the Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. Let's confine ourselves to this court room, if you please." (Tr. 5429-5430.)

Upon the hearing on the motion for new trial and even though several of the jurors had been subpoenaed, the de-

fense, though afforded an opportunity to interrogate the jurors, produced not a word of testimony to support their claim that the jurors heard the Considine broadcast. There is in the record no proof that any of the jurors were influenced by this broadcast or the so-called Winchell broadcast, or by anything else other than the evidence produced in open court.

The Court of Appeals stated:

"The presumption that obedient to instructions, the jurors ignored publicity during the trial has not been overcome by petitioner. The only showing that any of them encountered any of this publicity came when the trial judge questioned the jurors about a Winchell broadcast during the trial attributing marital infidelity to Dr. Sheppard. Two jurors advised that they had heard the broadcast, but would not be influenced by it, and an appropriate admonition on the subject was given by the judge. Defense counsel also requested interrogation of the jury as to their knowledge of another broadcast in which one Considine made remarks derogatory to Dr. Sheppard. The trial judge refused this request, observing that he did not think the jury should be harassed with interrogation each morning. We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matters prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree. Compare *Estes v. United States,* 335 F. (2) 609, 615 (CA 5, 1964), *cert. denied,* 379 U. S. 964 (1965); *United States v. Provenzano,* 334 F. (2) 678, 696 (CA 3, 1964), *cert. denied,* 379 U. S. 947 (1964); *Ford v. United States,* 233 F. (2) 56, 61-62 (CA 5, 1956), *cert. denied,* 352 U. S. 833, 1 L. Ed. (2) 53 (1956). In any event, any effect that this limita-

> tion of interrogation during trial might be thought to have is dissipated by the opportunity accorded defense counsel to interrogate jurors on their motion for a new trial. Three of the jurors were thus questioned, but counsel did not see fit to inquire into possible contact with trial publicity." (Pet. App. A, pp. s.29-s.30.)

Reference is made to publicity of the family of Juror Lois Mancini. This incident was considered by this Court in the former petition. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she was merely an alternate juror and did not participate in the deliberations or the verdict.

It is claimed that the trial court had a duty sua sponte to sequester the jurors. There is no requirement under the laws of the State of Ohio that a jury be sequestered during the trial. In fact, the Ohio statute makes it a matter of discretion on the part of the trial court. Section 2945.31 of the Revised Code of Ohio provides:

> "After the trial has commenced, before or after the jury is sworn, the court may order the jurors to be kept in charge of proper officers, or they may be permitted to separate during the trial. If the jurors are kept in charge of officers of the court, proper arrangements shall be made for their care, maintenance, and comfort, under the orders and direction of the court. In case of necessity the court may permit temporary separation of the jurors."

With the trial lasting over two months, there is no showing that the trial court abused its discretion, nor was there any request by the defense that the jury be sequestered during the trial. To keep the jurors from their families for that length of time would have imposed an unnecessary hardship upon the jurors. Further, the fact is that there is no affirmative evidence, nor did the petitioner offer any proof,

and the District Court points to none, that any juror read any of the alleged prejudicial newspaper publicity during the trial, contrary to the instructions of the trial court.

No claim was made by the defense in the state courts or on certiorari that the trial court abused its discretion in not sequestering the jury during the lengthy trial. Again, whether a jury should be sequestered is a matter of state legislation giving the trial court discretion.

Defense counsel in the instant case could have objected to any sequestration of the jury. The Court of Appeals pointed out:

> "* * * We cannot speculate now whether able defense counsel would have welcomed such a procedure, or whether long insulation and confinement of a jury trying a first degree murder case might be thought more likely to lead to conviction and a death penalty than permitting the jury the relaxation and refreshment of living at home, even with the possible exposure to extracurial publicity." (Pet. App. s.9.)

The Trial Court stated on the hearing on the motion for new trial:

> "While this Court would not for the world minimize the importance of guarding this jury—or the jury in any other case—from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.
>
> "The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note—and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and

ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

"It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

"The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (R. pp. 44a-45a.)

The District Court claims that special note must be given to the attempt of the newspapers to influence the jury by taking photographs of the jury so that they would look for their photographs in the newspaper and thereby expose themselves to the prejudicial reporting (R. p. 453a). On the motion for new trial, the trial court stated:

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single

complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest." (R. pp. 40a-41a.)

No pictures were taken of the jury during their deliberations in the jury room, nor is there any evidence that this jury was approached by the news media about the evidence in the case.

On the trial, the trial judge said:

"The court will state that; that at the outset of this trial the court ordered that no pictures be taken of the jurors while the impaneling was in progress, and absolutely refused to permit any pictures to be taken of the jurors in their seats during the impaneling and during the proceedings that resulted from the impaneling, and that the court had stated to the photographers and other newspaper representatives that if and when a jury was finally seated, that they would be permitted, outside of the court sessions, to have a picture of the jury, if all jurors were agreeable to that procedure." (Tr. 1635.)

The District Court comments that the newspaper ran editorials praising the trial judge and that he was a candidate for re-election; that this certainly was an attempt to bring him around to their way of thinking. (R. p. 453a.) And counsel for the petitioner infers in his argument to this Court, that if the trial judge had not been running for re-election to retain his post, and the prosecutor had not sought election to the bench, the petitioner would not have been convicted of this crime.

The state judge was not the trier of the facts in this case. The verdict on the facts was rendered by a jury. Nor is there any showing that the trial judge or the prosecutor were, as a result of running for election, denying due process to the petitioner. The Court of Appeals appropriately said:

> "Much has been made of the fact that the Sheppard trial begun on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this is emphasized to imply that desire for victory may have led the jury to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek reelection to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which we as judges like to believe is possessed by elected judges as well as those who have the security of tenure during 'good behavior.' Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate. Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's repetition in this Court of his broadside charge 'that the elective

judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts. * * *' " (Pet. App. A, pp. s.41-s.43.)

The District Court claimed that the requisite atmosphere for a fair trial did not exist. Counsel for the petitioner has submitted a wholly distorted picture of the arrangements made by the trial court before trial to govern the news media. For a fair and objective statement pertaining to such arrangements, we direct the attention of this Court to the words of the trial judge in his memorandum on the motion for new trial.

Regardless of what action was taken by the trial court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the trial court by all types of news media. When the affidavit in support of a motion for new trial (App. A, pp. s.158-s.164) was filed with the trial court, the trial Judge stated, in ruling upon the motion for new trial:

"Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space for many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.

"The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and moving out of the court room be via the public doorway in the rear of the court room. Mem-

bers of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

"Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel.

"The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to over-enthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

"Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

"* * *

"Some space outside of the court room which could be spared for the moment without interference

with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'

"Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (R. pp. 39a-41a.)

The Ohio Court of Appeals in its opinion, stated:

"It is claimed also that the court arranged the courtroom to accommodate a great many representatives of the press, radio and television and other news-disseminating agencies, thus restricting accommodations available for others. The record shows that the defendant's family was provided for and that the defendant's brother Dr. Stephen Sheppard, although a witness, was permitted by order of the court to remain in the courtroom throughout the trial. The court in this case was presented with a very difficult matter because of the unusual amount of coverage attempted by the press, radio and television agencies. The arrangements made by the court were within its sound discretion. Certainly the defendant was afforded a public trial, and from a reading of the record, we cannot say that the court in seeking to main-

tain an orderly proceeding abused its discretion in directing the courtroom arrangements." (R. p. 84a.)

The Court of Appeals said:

"The District Judge also concluded that news coverage of the trial deprived petitioner of his constitutional rights because it contributed to a 'carnival atmosphere.' Stress is laid on the manner in which the trial judge allocated the seating available in his small courtroom, giving most of it to the press and installing special tables for them. Now, with the reflection and the hindsight that an interval of ten years has provided, and after all of the appellate tribunals have found the judge's conduct in this regard without constitutional fault, it is asserted that the trial judge should have done a better job. We are not told what alternative measures he should have adopted. Certainly he was without power to slake the public interest. Should he then have selected news representatives who would be regularly favored with admission to the courtroom, and let each day's trial begin with a scramble by the unfavored to gain access? Should he have moved the trial out of the courtroom into some public hall or auditorium where the public and the press could be accommodated at a greater distance from the jury and counsel? Shall we now speculate whether such planning would have reduced or augmented the so-called 'carnival atmosphere'? It is asserted also that too many photographs were taken of the jury, the defendant, and counsel. No photographs were allowed to be taken in the courtroom while the court was in session. In view of today's increasing dissatisfaction with the aggressive performance of many of the news media, it may indeed be regretted that the trial judge did not enforce more rigid discipline of its representatives. But we can no more find impropriety of constitutional magnitude in what occurred than could the other appellate courts that have been challenged to do so.

"The claim that the trial judge contributed to a 'carnival atmosphere' is further supported by emphasis on the installation in the courtroom of a microphone and loudspeakers. This is surprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States District Courts. We find no merit in this claim." (Pet. App. A, pp. s.30-s.31.)

The Court of Appeals said further:

"The opinion of the District Court additionally criticizes activities of the press as follows:

'The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. *This was certainly an attempt to bring him around to their way of thinking.*' 231 F. Supp. 63. (Emphasis supplied.)

"Even if we were to join in the apparently gratuitous inference as to the press' motives, we have just examined the reasons why we cannot join in the presumption that the jurors violated their oaths and instructions by examining the trial publicity. Nor are we willing to assume the judicial venality or timidity we would have to assume to find any effect of such publicity on the judge in the face of a record which is entirely devoid of any evidence of trial misconduct on his part." (Pet. App. A, pp. s.31-s.32.)

Much is made of "disruption of the trial by newsmen." It is claimed that the newsmen were responsible for noise and laughter in the courtroom, but in the petitioner's brief

it is shown from the record that the noise was in the hall, not in the courtroom. (Pet. Br. p. 41.) And the fact that there were many newsmen at the trial does not in and of itself establish that there was any hostile atmosphere existing during the trial against the petitioner.

As to the incident of laughter (Pet. Br. p. 40), it resulted from Mr. Corrigan's remark "Well, I don't care what the conversation was" after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

As to the warning by the court relative to the exhibits, the son of defense counsel was observed examining and handling the pillow-case exhibit.

It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings.

The reference by the Ohio Supreme Court to the "atmosphere of a Roman holiday" merely described the widespread publicity furnished by the news media to the public at large and had no reference to the conduct of the trial itself, nor to the proceedings in the courtroom. The expression is also used to mean a "good time" or "field day." Certainly, there was no atmosphere of hostility existing against the petitioner on the trial. And it by no means follows that the news media slanted the news or even tried to do so to prejudice or to convict the petitioner. As clearly indicated by Judge Bell in his opinion, it was a case involving "murder and mystery, society, sex and suspense." The curiosity of the public, excessive though it may have been, necessarily brought about the widespread publicity.

As the majority of the Court of Appeals said:

"It should be observed here, however, that no rule of law, no procedural device, and no constitutional guarantee could then or now erase the murder of Dr. Sheppard's wife or its circumstances; such events inevitably cast the Sheppard trial into the setting so graphically described by Judge Bell. Judge Bell's accurate observation, in our view, merely demonstrates that the Ohio Supreme Court was fully aware of the subject before it. The fact that two of the Ohio judges dissented bespeaks the searching and vigor that must have attended the deliberations of the seven judges whose decision ended Ohio's appellate review of the matter now before us." (Pet. App. s.7-s.8.)

With reference to the argument that the public was barred from the trial except by special pass, the courtroom was small, and as this Court said in *Estes v. Texas,* 381 U. S. 532, 14 L. Ed. 2d 543, 584 (1965), by Mr. Justice Harlan:

"Obviously, the public trial guaranty is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guaranty will already have been met, for the 'public' will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed."

All we have in the instant case in the finding of the District Court that the jury was not a fair and impartial jury is suspicion, surmise, conjecture, and a general distrust of the jury with no basis in fact that the jury was not to be trusted to render a fair and impartial verdict based solely upon the evidence produced in court and the instructions of the court on the law applying to the evidence.

As the majority of the Court of Appeals said:

"Judge Blythin summed up his own estimate of the situation in the following language:

'We can't control publicity, and I do not believe that you will ever end the publicity in this case until you end the trial of this case, and I think perhaps it is our duty to put that business in reverse and proceed on a business-like, fair, honest, legal basis to try the case and have it disposed of in the interest of the State and certainly it is in the interest of Sam Sheppard to know whether a fair and impartial jury would declare him guilty or not guilty on the evidence which will be here produced. * * *'

We hold that petitioner failed to meet his burden of proving that the pretrial and trial publicity discussed above denied him due process of law or its equal protection." (Pet. App. s.33-s.34.)

II.

IMPARTIALITY OF THE TRIAL JUDGE.

The District Court made a finding that the trial judge should have disqualified himself (R. p. 456a).

This finding is based solely upon the unsworn statements of columnist Dorothy Kilgallen Kollmar to whom the trial judge allegedly said before the trial, "Well, he (Sheppard) is as guilty as hell and the case "is open and shut" (R. p. 457a); and Edward Murray, an employee in the office of the Clerk of the Common Pleas Court of Cuyahoga County, to whom the trial judge allegedly said months before the trial, "Sam Sheppard is as guilty as he (the judge) was innocent." (R. 386a.)

It is a matter of common knowledge around the Court House in Cuyahoga County that Ed Murray was a patient of the petitioner's brother, Dr. Steve Sheppard, and has a son in the same osteopathic field, who interned at the Sheppards' hospital.

It was also well known among the news reporters at the Criminal Courts Building during the trial, that Dorothy Kilgallen Kollmar was not on friendly terms with the trial judge and if anybody made a disturbance during the proceedings, she did. Judge Blythin had warned her that she would be barred from the courtroom if she did not obey his rules. She was always arriving late and rushing around to get material in a hurry for her noon lead.

A third unsworn statement was made by Mr. Garmone, one of the three trial counsel (R. p. 382a), which shows that defense counsel were satisfied that the trial judge would be fair and impartial in the handling of the trial, and that no affidavit of bias and prejudice was filed against the trial judge. While Judge Blythin's son was a member of the Cleveland Homicide Bureau, he did not participate in the investigation of this crime. The trial record shows who the investigating officers were.

We do not find that Dorothy Kilgallen's statement is a matter of record in the District Court. R. pp. 388a-392a shows her statement in which it is stated: "By agreement of counsel, no oath is administered since the integrity of the witness is not in dispute." The statement was taken on May 9, 1964 in New York, but how the District Court obtained the statement is not a matter of record. She was not cross-examined.

On the basis of this highly incompetent matter which would have no standing in any court, the District Court impugns the integrity of the state trial judge. The District Court concludes that these unsworn statements are uncontroverted evidence in this case and must be accepted as being true. (R. pp. 458a-459a.) Upon what legal basis must they be accepted as being true?

The statements do not even rise to the level of affidavits, and even if they had been made under oath, it

has been held that issues of fact cannot be established in habeas corpus proceedings by ex parte affidavits; *Walker v. Johnston*, 312 U. S. 275, 285, 85 L. Ed. 830, 61 Sup. Ct. 574 (1941); *Moses v. Hudspeth*, 129 F. 2d 279, 280 (10th Cir.) (1942), certiorari denied in 317 U. S. 665, 87 L. Ed. 534, 63 Sup. Ct. 73; *Jones v. Cunningham*, 313 F. 2d 347 (4th Cir.) (1963).

Further, the District Court knew that there is no way of rebutting these statements since the trial judge has been deceased for some years. To honor these unsworn statements is analogous to denying cross-examination. Waiting for some ten years until the State of Ohio, the plaintiff in the original action, was unable to defend by the refuting statement of an esteemed trial judge has the direct effect of denying the State of Ohio due process of law. And it is material to ask, where have these individuals been for the last ten years who are now claiming that Judge Blythin made such statements to them, if what they now say is the truth?

The District Court made no examination of the trial record to support his finding that the trial judge was biased and prejudiced, and the only proper and competent proof to determine this issue is the record of the trial which speaks for itself. Nor is there any showing in the trial record that the trial judge, in fact, did anything but properly carry out his duties as a presiding judge in this case in safeguarding and protecting the rights of this petitioner to a fair trial by a jury. Judge Blythin was not the trier of the facts. Issues of fact on the trial were determined by a jury, not by the judge.

In charging the jury, the trial judge said:

"It has undoubtedly occurred to you that deciding what the facts are in a case of this kind is a very important

function. It is, in fact, an all important function and is exclusively your function. With it I have nothing whatever to do, and if by anything that has been said or done during the progress of this trial, or by something that is now said, or by some emphasis which you may think I place on something I now say, there is expressed—there is created in your minds some impression that I have formed some opinion as to what the facts are in this case, you are now instructed to disregard and dismiss such impression entirely and to proceed to arrive at your own conclusions on the basis of instructions now being give to you. You are the sole judges of the facts in this case." (Tr. 6992-93.)

Section 2701.03 of the Revised Code of Ohio reads:

"When a judge of the Court of Common Pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the Court of Common Pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief justice of the Supreme Court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

This state legislation requires the timely filing of an affidavit of bias and prejudice and both the state constitutional provision and state statute require that the question of bias and prejudice be determined by the Chief

Justice of the Supreme Court. No affidavit of bias and prejudice was filed in the instant case in the state court.

It is stated in 30A *American Jurisprudence,* Sec. 172, p. 89:

> "A judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt, * * *"

Furthermore, even though the trial judge may have expressed an opinion as to the guilt of the petitioner to strangers to the case, there is no showing or any proof that the trial judge conveyed any such personal opinion to the jury, who were the triers of the facts. The trial judge did not render the judgment on the facts.

The Court of Appeals said:

> "We believe that the District Judge was under a misapprehension in assuming that because Judge Blythin could not answer the charges against him, such charges constituted 'uncontroverted evidence' that Judge Blythin had made the statements attributed to him. There are many circumstances in which testimony need not be accepted even though formally uncontradicted. *E.g., Quock Ting v. United States,* 140 U. S. 417, 420-22, 35 L. Ed. 501, 502-03 (1891); *Scates v. Isthmian Lines, Inc.,* 319 F (2) 798, 799 (CA 9, 1963); *Ramos v. Matson Nav. Co.,* 316 F (2) 128, 132 (CA 9, 1963); *D'Orsay Equip. Co. v. United States Rubber Co.,* 302 F (2) 777, 779-80 (CA 1, 1962); *Powers v. Continental Cas. Co.,* 301 F (2) 386, 388-89 (CA 8, 1962); *Wooley v. Great Atl. & Pac. Tea Co.,* 281 F (2) 78, 80 (CA 3, 1960); *Hasson v. C. I. R.,* 239 F (2) 778, 782 (CA 6, 1956); *Andrew Jergens Co. v. C. I. R.,* 125 F (2) 686, 689 (CA 6, 1942); *Goodyear Tire & Rubber Co. v. FTC,* 101 F (2) 620, 624 (CA 6, 1939), *cert. denied,* 308 U. S. 557, 84 L. Ed. 468 (1939); 8 Cyclopedia of Fed. Proc. § 26.98 (3d ed. 1951); 11 Id. § 47.161 (3d ed.

1963); 7 Wigmore, *Evidence*, § 2034, pp. 260-63 (3d ed. 1940). Manifold reasons for rejecting the 'uncontroverted' statements adduced by petitioner exist in the present case. Whether offered to prove the matter asserted or merely the fact of assertion, testimony as to the uncorroborated oral statement of a deceased person is the weakest form of evidence, viewed with suspicion and subject to close scrutiny. 'The courts consider with suspicion, or lend a reluctant ear to, statements as to what a deceased person may have said, especially when corroboration is lacking.' 31A C. J. S. *Evidence*, § 266, p. 689. Such statements 'are regarded as of comparatively little probative value. * * *' 20 Am. Jur. *Evidence*, § 1196, p. 1048, and '* * * courts of justice lend a very unwilling ear to statements of what dead men had said,' *Lea v. Polk County Copper Co.*, 62 U. S. (21 How.) 493, 504, 16 L. Ed. 203, 207 (1859). * * *" (Pet. App. A, pp. s.35-s.36.)

The Court of Appeals said further:

"The only authorities cited by the District Judge for his finding of constitutional error in the failure of the trial judge to recuse himself, *State, ex rel. Pratt v. Weygandt, Chief Justice*, 164 Ohio St. 463, 132 NE (2) 191 (1956); *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749 (1927); *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942 (1955), are completely inapposite. In the case at bar it was the jury and not the judge who determined the guilt or innocence of petitioner. *Pratt v. Weygandt* was a divorce case to be decided entirely by the trial judge, and mandamus to compel his replacement was refused. *McFadden v. United States*, 63 F (2) 111 (CA 7, 1933), not cited by the court below, is also distinguishable as involving a trial to the judge without a jury. Similarly, in *Tumey v. Ohio*, the United States Supreme Court held improper state provisions for trial of liquor law violations before a village mayor who was to retain the amount of his costs in each case of conviction, in addition to his

salary. The Court said, 'But no fees or costs in such cases are paid him except *by the defendant if convicted.* There is, therefore, no way by which the mayor may be paid for his service as judge, *if he does not convict* those who are brought before him * * *.' 273 U. S. 520, 71 L. Ed. 753. (Emphasis supplied.) The Court also noted that 'all questions of judicial qualification may not involve constitutional validity. Thus matters of * * * personal bias * * * seem generally to be matters merely of legislative discretion.' 273 U. S. 523, 71 L. Ed. 754. *In re Murchison* involved the Michigan 'one-man grand jury' statute and the Supreme Court held that due process was denied where the judge presiding at a contempt hearing had also served as the 'one-man grand jury' out of whose proceedings the contempt charges arose. The distinction between these cases and the case at bar is obvious." (App. A, pp. s.39-s.40.)

There is no basis in the trial record for any finding that the trial judge did not discharge his duties with due regard for the constitutional rights of the petitioner to a fair trial.

III.
LIE DETECTOR TESTIMONY.

It is not a fact, as stated by present counsel (Pet. p. 32) that defense counsel "cited specifically" the publicity given petitioner's refusal to take a polygraph test when he sought a change of venue and/or a continuance. And, publicity concerning the lie detector occurred months before the trial.

The petitioner did not allege as error in the state courts, the admission of testimony concerning his unwillingness to take a lie detector test.

The District Court found that it had jurisdiction to consider this alleged error even though it was not urged on appeal to the Ohio Courts (R. pp. 464a-465a); and

found further that the trial judge had the duty of instructing the jury that no inference could be drawn from petitioner's refusal to submit to such a test, and by failing to do so, he violated petitioner's constitutional rights. (R. p. 468a.) The court quotes from *Fay v. Noia*, 372 U. S. 391, as authority for taking jurisdiction on this issue although it was not raised in the state courts.

Failure to obtain review in the state courts on this issue was not because any appellate remedies were withheld by the state courts as in *Noia, supra*, and all that *Noia* stands for is that failure to timely appeal from a state conviction did not bar federal habeas corpus relief under exceptional circumstances. For this Court said in *Noia*, 372 U. S. 391, at pages 428-429:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. See, e.g. NAACP v. Alabama, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163; Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183. Section 25 of the Judiciary Act of 1789, c 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other 'than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) constitution, treaties, statutes, commissions, or authorities in dispute.' The deletion of the express restriction by the Judiciary Act of February 5, 1867, c 28, Sec. 2, 14 Stat. 386-387, did not enlarge this Court's power in that regard. * * *"

This Court stated also in *Noia*, 372 U. S. 391, at p. 441:

> "Noia's case stands on its own. * * *"

We contend that by this piecemeal consideration of an issue that could have been raised in the state courts, the

District Court encroached upon the state appellate court's prerogative to search the record and determine whether the admission of this testimony and the instruction of the trial court was error, and if error there was, whether it was prejudicial.

And the cases cited by the District Court in the instant case, namely, *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), *Ohio v. Smith*, 113 O. App. 461 (1960), and *New Jersey v. Driver*, 183 A. 2d 655 (1962) are decisions in which appellate courts were exercising their appellate court prerogatives in determining whether there was prejudicial reversible error in the admission or exclusion of evidence pertaining to the lie detector.

As stated in *Wolf v. Nash*, 313 F. 2d 393 (C. A. Mo.) (8th Cir.) (1963), certiorari denied, 83 S. Court 1713, 374 U. S. 817, 10 L. Ed. 2d 1041, the due process clause of the 14th Amendment does not enable a federal court to review errors of state law.

Furthermore, there is no foundation in the record for the raising of any claim that the petitioner's constitutional rights were violated in the admission of conversations between the petitioner and the officers concerning the lie detector. The defense went into the matter also on the trial, on this issue. How was the petitioner denied due process of law under the circumstances?

The trial court instructed the jury that a person is not compelled to take a lie detector test (Tr. 3852). The trial court had nothing before it upon which to instruct the jury further concerning the lie detector. In relating his first conversation with the petitioner about taking a lie detector test, Officer Schottke testified on direct examination:

> "He was then asked if he would take a lie detector test and he said 'yes.' He asked how a lie detector

worked and we told him that it takes the reaction of the respiratory system.

* * * He said that due to his present condition, that he didn't feel as though this would be a fair test and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better." (Tr. 3950-3951.)

No objection was made to this testimony.

On cross-examination of Officer Schottke, defense counsel questioned him as follows regarding a later conversation he had with the petitioner:

"Q. Now, during that conversation you asked him about the lie detector again, didn't you?

A. I don't recall at this particular time whether I did or not.

Q. Well, to try and refresh your memory, did you say to him, 'Doctor, are you still willing to take a lie detector test?'

A. I don't recall at this time, sir.

Q. And did he say to you that, 'I am willing, but not one that will be conducted by the Cleveland Police Department, because you have already accused me'?

Did he answer you that way?

A. I don't recall.

Q. And did he add that, 'If you can find somebody that is competent in a community far removed from the city of Cleveland,' that he would be willing to accompany you and take the test that you requested of him?

A. I don't recall that conversation.

Q. You don't recall that. But you wouldn't say to this Court and jury, under the oath that you have accepted to tell the truth, that that conversation didn't take place, would you, Officer Schottke?

A. I don't recall at this time the conversation that you state." (Tr. 3727-3728.)

And on re-cross-examination, Officer Schottke was again questioned concerning the petitioner's willingness to take a lie detector test. (Tr. 3743.)

At Record 3846, Deputy Sheriff Rossbach related his conversation with the petitioner about taking a lie detector test. No objection was made to this testimony. It was not until later on, during Rossbach's testimony, that the defense, for the first time, objected to testimony concerning the lie detector (Tr. 3851) which was followed by the court's instruction to the jury that no one is compelled to take a lie detector test.

Despite the above objection, Dr. Sheppard when testifying in his own behalf on direct examination by his counsel, told about the first request that he submit to a lie detector test and stated that he told the officers he would be willing to submit to such examination "if it was a reliable test."

On direct examination, the petitioner testified:

> "A. Officer Schottke said that, would I submit to a so-called lie detector test, and I said I certainly would if it was a reliable test." (Tr. 6298.)
>
> * * *
>
> "the last I knew, the lie detector has—the so-called lie detector was far from infallible, but if it were, I would certainly take it." (Tr. 6298-99.)

The petitioner, of course, had not submitted to any lie detector test, but in view of what the record shows, where is there any support for holding that the admission of this testimony constituted prejudicial reversible error, or that the petitioner was denied due process of law on this issue. The trial court in instructing the jury that no one is compelled to take a lie detector test was merely applying a rule of evidence. This raises no federal question. As

stated in *Buchalter v. People of State of New York*, 319 U. S. 427, 431, 63 S. Ct. 1129, 1131, 87 L. Ed. 1492:

> "The due process clause of the 14th Amendment does not enable us to review errors of state law however material under that law. See also Lisenba v. People of State of California, 314 U. S. 219, 226-229, 62 S. Ct. 280, 86 L. Ed. 166."

The District Court found that Mayor Houk's testimony concerning the taking of a lie detector test permitted the jury to infer that he had passed the test and that Houk was not on trial. (R. p. 469a.)

Houk was merely a witness in this case, not the defendant. The petitioner's brother, Dr. Steve Sheppard, had filed charges with the police against Mayor Houk, and Houk's willingness to take the lie detector test was simply one item of fact to show both his attitude and conduct. It certainly does not raise any constitutional issue for the petitioner because Mayor Houk took a lie detector test, nor could it be consistently claimed that the petitioner was denied due process of law because Mayor Houk was willing to take a lie detector test.

In the instant case, the State court by its instruction to the jury concerning the lie detector was merely interpreting state law. There is no adequate federal basis for the finding of the district court on this issue. The mere suggestion that the petitioner submit himself to certain tests did not deny him due process of law. He did not take any tests nor was he compelled to do so.

The Court of Appeals stated:

> "* * * We cannot find that the handling of this matter deprived the petitioner of any federally granted constitutional rights. If there was fault in what occurred, it was a nonconstitutional error which should have been assigned on appeal. Habeas corpus

is not to be employed as a substitute for appeal. *E.g.*, *Oyler v. Tayor*, 338 F (2) 260, 262 & n. 3 (CA 10, 1964); *Allen v. Bannan*, 332 F (2) 399, 402 (CA 6, 1964); *Barker v. Ohio*, 328 F (2) 582, 584-85 (CA 6, 1964); *Worth v. Michigan*, 291 F (2) 621, 622 (CA 6, 1961), *cert. denied*, 368 U. S. 862 (1961); *Anderson v. Jones*, 281 F (2) 684, 686 (CA 6, 1960).

"We think that the observations of the Seventh Circuit in *United States ex rel. Townsend v. Ogilvie*, 334 F (2) 837, 843-44 (1964) are pertinent here.

> 'The (federal) court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.
>
> 'A federal court acting in this fashion would constitute a super appellate tribunal and encroach upon state appellate court prerogatives; such action would affront the principles of federalism upon which our federal-state juridic system operates.'

"At this distance, we cannot say that the decision of Dr. Sheppard's veteran counsel to withhold objection to the lie detector evidence prejudiced their client. It goes without saying that Dr. Sheppard's conviction does not prove such.

"As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that

the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunities for appellate review." (Pet. App. A, pp. s.48-s.49.)

The right to present error with respect to a disclosure that the petitioner had refused to take a lie detector test was waived by counsel. The witnesses were cross-examined on the subject and the defense by the petitioner's own testimony on direct examination got before the jury the disbelief of people generally that such tests are reliable and thus avoided any unfavorable inferences (Tr. 6298-99). Counsel had presumably taken the position that to explore the subject in detail would be advantageous to his cause. Cf. *United States v. Bando,* 244 F. 2d 833 (1957), cert. den. 355 U. S. 844, 2 L. Ed. 2d 53, 78 S. Ct. 67; *Rank v. State* (1962, Alaska), 373 P. 2d 734. Further, the function of the trial jury to assess the credibility of the petitioner was not usurped by the introduction of any results of a lie detector test.

IV.

ALLEGED MISCONDUCT OF BAILIFFS IN ALLOWING JURORS TO CALL THEIR FAMILIES.

This issue was before this Court on the previous petition for a writ of certiorari.

We wish to point out, at the outset, that the matters complained of took place in the hotel room when some of the jurors called their husbands or children on the telephone, and not in the jury room during the deliberations. The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence in the record showing any misconduct of the jury or of the officers in charge.

The telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the petitioner.

There is no evidence whatsoever of telephone conversations with strangers. The testimony of Bailiff Edgar Francis follows:

> "Q. Do you know, of your own knowledge, whether there were any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?
>
> A. Their phones were cut out, Mr. Garmone.
>
> Q. By whose request?
>
> A. Mr. Steenstra arranged that.
>
> Q. And were there any telephone calls made from the room that you occupied?
>
> A. Yes, sir.
>
> Q. Did you make the calls, or did the jury make the calls?
>
> A. No. The jury made the calls, and I sat in the chair right alongside the telephone.
>
> * * *
>
> Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?
>
> * * *
>
> A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.
>
> Q. Was there any conversation whatsoever about this case or their deliberations?
>
> A. Not one word, Mr. Parrino." (Tr. 7084-7085.)

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to

pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the petitioner.

The trial court stated when a supplemental motion for new trial was filed:

> "The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his wholehearted approval." (R. p. 47a.)

The Supreme Court of Ohio in the opinion states:

> "Defendant contends that he was prejudiced in this case by the actions of two officers of the court, in whose charge the jury was committed during its deliberations, in permitting some members of the jury to make unmonitored telephone calls in violation of Section 2945.33, Revised Code, which reads as follows:
>
> > 'When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not per-

mit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court * * *.'

"It is conceded that no authorization for such telephone calls was given by the court.

"At the conclusion of each day's deliberation, the members of this jury were housed in the Carter Hotel, under the supervision of two court bailiffs. The record reveals that the telephones in the hotel rooms occupied by individual jurors had been 'cut out.' However, some of them were permitted to make calls on the telephone in the room of one of the bailiffs.

"Counsel for defendant rely upon State v. Adams, 141 Ohio St. 423, 48 N. E. (2d) 861, 146 A. L. R. 509, as authority for their contention that the action of the bailiff in permitting these telephone calls constituted error prejudicial to the defendant. They cite the third paragraph of the syllabus of that case, which reads:

'The violation by a court officer in charge of a jury of Section 13448-1, General Code (Section 2945.33, Revised Code), to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.'

"A mere reading of the following fourth paragraph of the syllabus of the Adams case should be sufficient to distinguish that case from the present one:

'Where a court bailiff, on being informed by the jury during its deliberations that it could not agree, stated to it: 'You can't do that. You must reach a decision if you have to stay here for three months,' there is a violation of the statute which is prejudicial to a defendant against whom, following such declaration, a verdict is returned by the jury.'

"The case of Emmert v. State, 127 Ohio St. 235, 187 N. E. 862, 90 A. L. R. 242, although not cited by defendant, might also be authority for the proposition that misconduct of a bailiff is ground for reversal. That case, however, is also readily distinguishable from the present one. In the Emmert case the officer in charge of the jury, at a time when it was not actually in its deliberative sessions, said to certain members of the jury: 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Other remarks of a similar nature to the effect that the jury had to reach a verdict were made by the bailiff.

"In situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

> "The law in Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this Court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families." (R. pp. 111a-113a.)

The District Court says that the Supreme Court of Ohio should have granted a new trial because of the unequivocal language of Section 2945.33, *supra*, and cites *Mattox v. United States*, 146 U. S. 140 (1892). But in the *Mattox* case, which was heard on appeal, communications with the jury were shown to be harmful. A newspaper account of the case was introduced into the jury room during deliberations, bearing upon the merits of the case. The record in the instant case, however, affirmatively shows that the telephone calls made by the jurors to members of their immediate families were harmless. The District Court's conclusion that they were harmful to the petitioner is again based upon a suspicion that the jurors were not to be trusted in following the instructions of the court not to discuss the case with anyone.

Further, we cannot see where a Federal District Court has any jurisdiction on habeas corpus to interpret a state statute such as Section 2945.33, or determine how that law should be applied by the state courts in the light of the facts in a particular case. The Supreme Court said in *Townsend v. Sain*, 372 U. S. 293, 311-12 (1963):

> "The whole history of the writ * * * refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review."

The Court of Appeals stated:

"* * * Here again the District Judge placed reliance on cases the facts of which disclose their lack of resemblance to the case before him and us. *State v. Adams,* 141 Ohio St. 423, 48 NE (2) 861, 146 ALR 509 (1943); *Emmert v. State,* 127 Ohio St. 235, 187 NE 862, 90 ALR 242 (1933); and *Mattox v. United States,* 146 U. S. 140, 36 L. Ed. 917 (1892). In *State v. Adams,* a bailiff who had been told by the jury that it could not agree said to them, 'you can't do that. You must reach a decision if you have to stay here for three months.' In *Emmert v. State,* the officer in charge of the jury remarked to certain jurors, 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Aside from this obvious inappositeness, these Ohio cases were found not controlling of this case by the Ohio Court. *Mattox v. United States* involved direct review of a federal trial. Because the dissenting opinion frequently cites *Mattox* to support its conclusions, we have set out in the margin Chief Justice Fuller's recital of the facts in *Mattox* because it discloses a situation totally different from the facts of the present case * * *." (Pet. Appendix A, pp. s.52-s.54.)

The Court of Appeals continued:

"* * * The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. So in *Near v. Cunningham,* 313 F. (2) 929, 933 (CA 4, 1963), the court ruled that 'should it appear that prejudicial statements were made in the presence or hearing of the jurors,' the habeas corpus court must reach its constitutional decision 'in the light of all of the surrounding circumstances.' Here there is no pretense at showing that prejudicial statements were made to the jurors by their children or spouses. The pre-

sumption that the jurors remained true to their instructions is fortified by petitioner's neglect of his opportunity to show that the jurors chose this particular opportunity among many to violate their instructions. In view of the absence of any attempt to demonstrate or even claim such violations here, we are satisfied that the Ohio Supreme Court correctly disposed of this issue, and that in any event the occurrence does not present a denial of constitutional due process." (Pet. Appendix A, pp. s.55-s.56.)

The Supreme Court of Ohio in interpreting Section 2945.33, *supra,* in the light of the facts in the instant case, was exercising appellate jurisdiction over state legislation. Under Section 2945.83, *infra,* pp. 82-83, it must affirmatively appear from the record that these telephone calls were harmful. There is no proof and none was offered on the motion for new trial, that the calls were anything but harmless.

V.

OTHER ALLEGED CONSTITUTIONAL VIOLATIONS.

The claims under this heading in the petitioner's brief are unsupported by any findings by the District Court, and to avoid needless repetition, we incorporate herewith by reference, the argument we presented to this Court on these various issues in our previous amicus curiae brief.

The petitioner's brief makes reference to matters concerning the possession of the home of the petitioner and it is argued that a Dr. Paul Leland Kirk discovered a large blood spot in the murder room that did not come from the petitioner; that if the jury had had this evidence, they would have acquitted.

Neither the record of the trial nor the affidavits in support of the motion for new trial on the ground of newly

discovered evidence disclose a single instance of a denial of access to the premises for purposes of examination or inspection by the defense.

It is also to be noted that the premises were available for such inspection or examination from July 4th until the middle of December when the cause was finally submitted to the jury; that Dr. Kirk did not make his investigation until January 22nd to January 26th, 1955, a month after the Sheppard family had not only the keys but complete possession of the premises.

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination of the premises for blood spots, fingerprints, etc., by the scientific unit of the Cleveland Police Department. It was also necessary to continue the examination and search in and about the house for possible clues and particularly for the still missing T-shirt and weapon. The whole episode in the closing days of the trial, and the demand for the keys to the home in the presence of the jury, was a grandstand play and show, and nothing else.

In the meantime, the petitioner and his counsel had, on more than one occasion, visited the home, went through all the rooms and examined the house, both inside and outside.

The petitioner removed his medical bags and the contents. He and the members of his family also removed his clothing, his son's clothing, and various other articles. Also removed were his automobiles, consisting of a Jaguar, a Lincoln Continental and a jeep. Except for the Lincoln Continental, all of these articles of property were removed within a week or two following the murder of Marilyn Sheppard and became unavailable for further examination

by the scientific unit of the Cleveland Police Department when, at a later date, the case was turned over to them for further investigation.

VI.

SUFFICIENCY OF THE EVIDENCE.

This claim of the petitioner that the evidence on the trial was insufficient, was considered by the Court of Appeals, and the Court said:

> "One further subject should be briefly mentioned. Dr. Sheppard's petition claimed that the evidence at his trial was constitutionally insufficient to justify submitting the issue of guilt or innocence to the jury. This claim was neither withdrawn nor sustained upon the hearing in the District Court. On this subject, the petitioner's brief states,
>
> 'The District Judge expressly declined to consider this issue * * *, although in all fairness it should be stated that counsel for petitioner-appellee on several occasions offered to waive this claim of error. * * * No waiver was required, however, *and the issue remains.* This Court no doubt has the power, since the trial transcript is before it as an exhibit from the District Court to search the record and conclude that the allegation of insufficiency is well-taken.' (Emphasis supplied.)
>
> "We construe this as a suggestion that we pass upon this point only if we find in his favor. Counsel continues as follows:
>
> 'Appellee neither asks nor urges such relief, for he is ready, willing and anxious to stand retrial in any community not infected with an envenomed atmosphere, and a favorable ruling upon this issue would cause jeopardy to attach to the 1954 trial. This is not, however, to be taken as any concession that there was sufficient evidence to constitutionally support a judgment of conviction in the first in-

stance, for we vigorously contend that there was not. We simply do not press it at this time.'

"The Court of Appeals decision, affirmed by the Ohio Supreme Court, fully discussed the evidence and found it sufficient for submitting the issue of guilt to the jury. 100 Ohio App. 345. No claim is made here that that court's detailed recital of the evidence adduced at the trial is substantially erroneous. Without attempting to assess petitioner's actual guilt or innocence, this recital clearly establishes that Dr. Sheppard's conviction is not 'so totally devoid of evidentiary support' as to constitute a denial of due process. *Garner v. Louisiana*, 368 U. S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U. S. 199 (1960); *Hall v. Crouse*, 339 F. (2) 316 (CA 10, 1964).

"Petitioner apparently desires to save something for a further entry into or a rehearing in the District Court. We think that Ohio's appeal has brought the entire habeas corpus proceeding to us. We have passed upon it and do not find any basis for the release of Dr. Sheppard or the granting of a new trial." (Pet. Appendix A, pp. s.57-s.58.)

VII.

THE AGGREGATION OF ERROR.

On this issue, the Court of Appeals appropriately said:

"Each of the 'errors' discussed above was found by the District Judge to constitute a deprivation of due process, but he concluded his opinion with the observation that when taken together they reduced the trial to a 'mockery of justice.' Without further discussion, we are unable to attribute to a combination of these several claims a constitutional potency they lack individually. We have rejected the claims based on publicity, alleged bias of the trial judge, and communications with the jurors because no showing has been made that anything improper in fact occurred; we are no more willing to presume infirmity when

these claims and the matter of the lie detector evidence are listed together than when they are considered separately." (Pet. App. A, p. s.56.)

CONCLUSION.

The opinions of newspaper editors and newspaper articles should not be received as a substitute for evidence, nor as a substitute for the well-reasoned opinions of the trial and reviewing courts based upon the record.

This case stood adjudicated on the merits when this Court denied certiorari and denied a rehearing. Certainly, habeas corpus should not be permitted to be used as another appeal on the merits.

There was no interference by the news media with the handling of this trial by the trial judge, nor did the State trial judge deprive this petitioner of any constitutional right on the trial itself.

As the trial record shows, there was no justification for the retrospective application by the District Judge of *Rideau* and *Irvin*, *supra*.

Section 2945.83 of the Revised Code of Ohio, governing the state courts on review, provides:

> "2945.83 (13449-5). When new trial shall not be granted.
>
> No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> (A) Any inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
>
> (B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it *affirmatively appears on the record* that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears *affimatively from the record* that the accused was prejudiced thereby or was prevented from having a fair trial."

This state statute is in conformity with the ruling of this Court in many cases. As the Court of Appeals stated:

"Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that he must carry the burden of demonstrating the constitutional vice in his conviction. As stated by the First Circuit in another publicity case, 'the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion * * *.' *Geagan v. Gavin*, 292 F. (2) 244, 246 (CA 1, 1961), *cert. denied*, 370 U. S. 903 (1962). This burden is one which must be carried ' "not as a matter of *speculation but as a demonstrable reality.*" ' *United States ex rel. Darcy v. Handy*, 351 U. S. 454, 462, 100 L. Ed. 1331, 1338 (1956) (emphasis supplied); *Stroble v. California*, 343 U. S. 181, 198, 96 L. Ed. 872, 885 (1952). See also *Adams v. United States ex rel. McCann*, 317 U. S. 269, 281, 87 L. Ed. 268, 276 (1942)." (Pet. App. A, s.8.)

* * *

"The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state." (Pet. App. s.59.)

We respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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